



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

February 5, 2008

The Honorable Martha Fuller Clark, Chairman
Energy, Environment and Economic Development Committee
Legislative Office Building, Room 102
Concord, New Hampshire 03301

Re: SB 435, relative to fill and dredge permits in wetlands

Dear Chairman Fuller Clark:

Thank you for the opportunity to comment on SB 435, relative to fill and dredge permits in wetlands. The Department of Environmental Services (DES) does not support this bill, for the reasons explained below.

RSA chapter 482-A (Fill and Dredge in Wetlands) prohibits the excavation or filling of wetlands in or adjacent to any waters of the State without a permit from DES. The Department's Wetlands Bureau staff carefully review approximately 2,500 applications every year to ensure that direct impacts to wetlands are avoided, minimized to the maximum extent possible and that any permitted impacts are appropriately mitigated. The Department's focus, consistent with its statutory authority and with its expertise in wetlands science, is on the impacts to the wetlands resources that may be caused by the dredging or filling activities.

SB 435 proposes to substantially broaden the State's jurisdiction over wetlands regulation by providing new definitions for "direct impacts" and "indirect impacts" (to wetlands) of "project proposals." If enacted, SB 435 would require that DES base its permitting decisions on not only the direct, measurable or predictable impacts to wetlands caused by the proposed dredging and filling activities, but also on the direct and indirect impacts caused to both wetlands and uplands by the "project development plans taken in their entirety, including post-construction uses and operations."

In our opinion, the adoption of SB 435 would substantially, and inappropriately, expand the regulatory jurisdiction of the wetlands permitting program. It would create standards for wetlands permit application evaluation that are too broad and ambiguous for clear, effective implementation by the DES Wetlands Bureau. The DES Wetlands Bureau is staffed with personnel trained in wetlands science and assessing the direct impacts to wetlands from a proposed activity. The assessment of the indirect impacts of a proposed development on both wetlands and uplands, including future post-construction activities and future operations at a site, would require ecological and land use regulation expertise that is beyond that held by DES wetlands staff. Conducting such a review would, in our view, convert the wetlands program into a state-level land use and site planning authority. The regulation of development projects "in their entirety" is currently a municipal function that is addressed through planning boards and local land use ordinances.

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SB 435 would create a dramatically expanded regulatory framework that would be impractical for the DES Wetlands Bureau to implement. It would require a significant expansion of staff to conduct meaningful analyses of all of the direct impacts of both a proposed dredging and filling activity and the predicted indirect impacts to wetlands that might be caused by post-construction activities and future uses of a property. This would necessitate a significant increase in application fees, as well as substantially longer application review time frames. Consideration of fee increases is best undertaken in connection with the biennial budget process. For this reason, among many others, this bill is untimely and cannot be supported by DES.

It is important to note that some of the responsibilities proposed by SB 435-FN to be included in the wetlands statutes are already covered, in whole or in part, by other DES programs, including the Alteration of Terrain (AoT) program (see RSA 485-A:17) for stormwater management and the water quality certification program for surface water quality by which DES implements Section 401 of the Federal Clean Water Act. Therefore, it is possible, upon further analysis, that RSA 482-A may not be the most appropriate chapter for this type of broad legislation.

We also believe that significant changes to New Hampshire's wetlands statutes should not occur without a careful review of the authority (Section 404 of the Federal Clean Water Act) of the federal wetlands program implemented by DES and the U.S. Army Corps of Engineers under the New Hampshire Programmatic General Permit (NHPGP). We recommend that consideration of the relationships of the state wetlands program with the federal wetlands program, as well as the other state programs noted above, be fully reviewed before the scope of the wetlands program requirements in RSA 482-A is expanded as proposed by SB 435.

DES has a strong interest in the broad policy questions raised by SB 435 concerning the impacts of development to both wetlands and uplands. However, we believe that, prior to enacting this type of legislation, a diverse stakeholder group with representatives from environmental, development and municipal interests should be brought together to develop consensus on a clear set of environmental and development policy criteria to provide direction for New Hampshire's future growth. DES is undertaking to convene such a stakeholders group within the next few months, and will keep this Committee apprised of the status of this effort.

Thank you for this opportunity to comment on this bill. Please feel free to call me at 271-2958, or Collis Adams at 271-4054, if you have any questions or need additional information.

Very truly yours,



Thomas S. Burack
Commissioner

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cc: Senator Harold Janeway